

**United States Court of Appeals**  
**FOR THE EIGHTH CIRCUIT**

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No. 03-2807

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United States of America,

Appellee,

v.

Aurelio Lavariega-Diego, also known  
as Aurelio Lavariega,

Appellant.

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Appeal from the United States  
District Court for the Northern  
District of Iowa.

[UNPUBLISHED]

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Submitted: December 5, 2003

Filed: December 12, 2003

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Before BYE, BOWMAN, and MELLOY, Circuit Judges.

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PER CURIAM.

Aurelio Lavariega-Diego challenges the sentence the District Court<sup>1</sup> imposed upon his guilty plea to illegally reentering the United States after deportation following a conviction for aggravated domestic-abuse assault, in violation of 8 U.S.C.

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<sup>1</sup>The Honorable Mark W. Bennett, Chief Judge, United States District Court for the Northern District of Iowa.

§ 1326(a)–(b) (2003). On appeal, his counsel has filed a brief and moved to withdraw under Anders v. California, 386 U.S. 738 (1967).

On appeal, counsel argues that the sentence imposed was too harsh, because Lavariego-Diego’s domestic-abuse history—which was the reason the District Court gave for sentencing him at the top of the applicable Guidelines range—was fully accounted for in his criminal history score and in the 16-level increase to his base offense level. This argument fails. Lavariega-Diego’s sentence falls within 8 U.S.C. § 1326(b)’s 20-year maximum, it is within the appropriate Guidelines range, and we will not review the sentence merely because it is at the top of the range. See United States v. Smotherman, 326 F.3d 988, 989 (8th Cir.) (per curiam), cert. denied, 124 S. Ct. 293 (2003) (sentence at top of correct range does not create constitutional infirmity allowing appellate review).

Having found no nonfrivolous issues after reviewing the record independently under Penon v. Ohio, 488 U.S. 75 (1988), we affirm. We also grant counsel’s motion to withdraw.

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